

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & Affidavit of Mailing

77-1277

To be argued by
MARK A. SUMMERS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1277

UNITED STATES OF AMERICA,

Appellee,

—against—

BERNARD BERMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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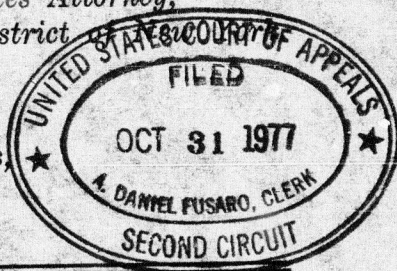


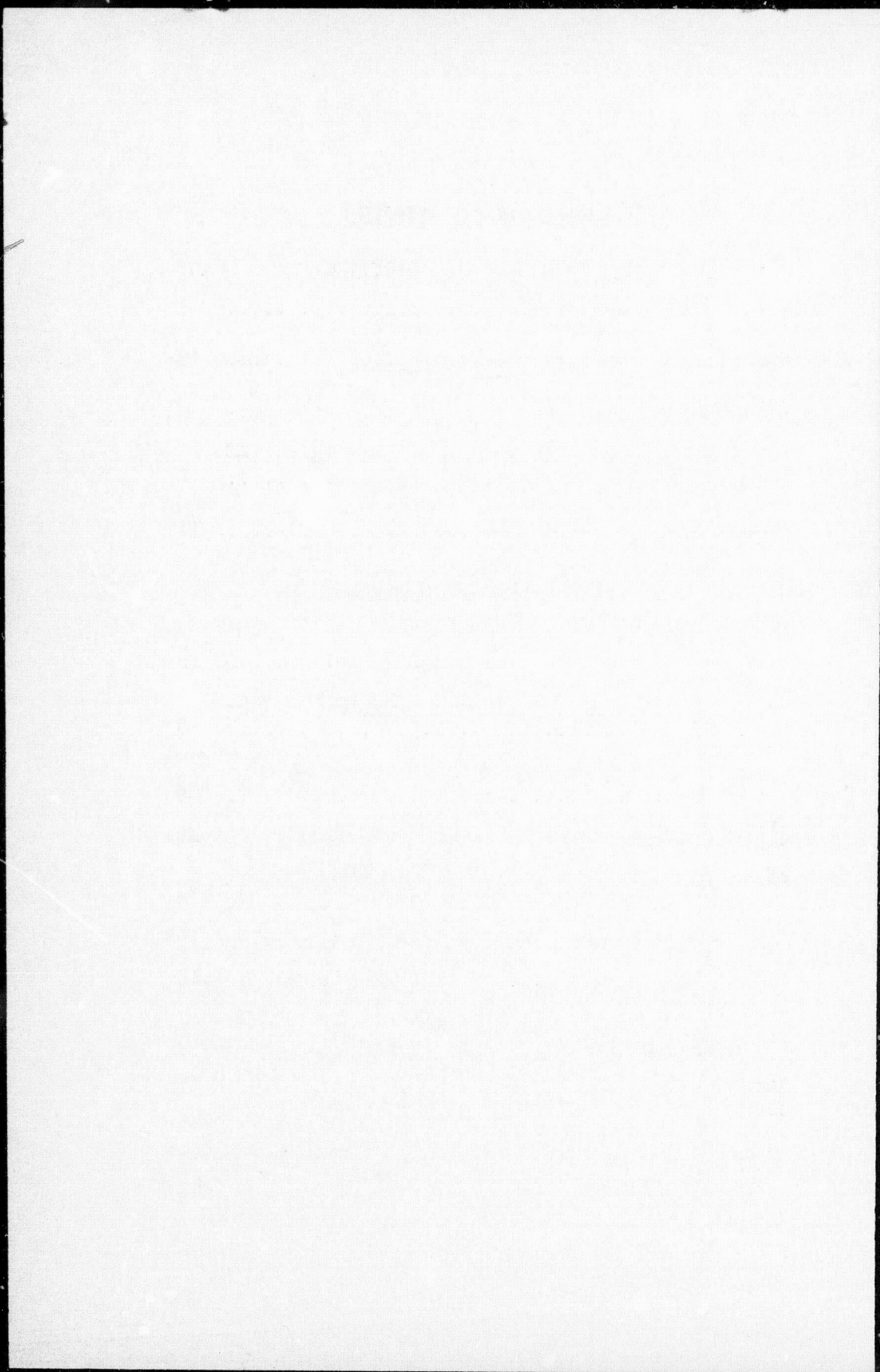
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BERNARD BERMAN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Bernard Berman appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, J.), entered on May 27, 1977, convicting him, on his plea of guilty to the first count of a three-count indictment, of conspiring to import hashish into the United States, in violation of 21 U.S.C. § 846. Berman was sentenced to three years imprisonment and a special parole term of five years and was fined \$10,000. He is free on bail pending this appeal.¹

¹ Counts Two and Three of the indictment, which charged Berman, respectively, with importation of hashish, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and 18 U.S.C. § 2, and with possession of hashish with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, were dismissed on motion of the Government at the time of sentencing.

On appeal, Berman contends that the Government failed to fulfill its plea agreement promise to bring his cooperation to the attention of the court and that, as a result, he should either be resentenced or his plea vacated and the indictment against him dismissed.

Statement of Facts

I.

Berman's indictment arose out of his participation in a scheme to smuggle a large quantity of hashish into the United States. The record shows that on or about March 3, 1976, a shipment arrived on Air India at John F. Kennedy International Airport from India. The shipment included twenty-eight crates containing approximately 717 pounds of marijuana in the form of hashish. Customs Officials, through the use of special dogs, identified the crates as containing hashish and placed them under surveillance (A. 69).² Thereafter, agents of the Drug Enforcement Administration ("DEA") observed Berman paying Air India \$3,846.35 to cover shipping costs and duty charges, thus enabling the crates to be released under his authority (A. 15). Berman then had the crates loaded into a truck from a moving company. However, as the truck was leaving the cargo area, it was intercepted by the agents and Berman was arrested (A. 69-70). Also apprehended at the same time were Philip Atlas and Barry Jacobs, both of whom had been observed closely watching the loading of the truck and who tried to flee upon Berman's arrest (A. 70-71). Following their arrest, Atlas and Jacobs were both named in the same three-count indictment as Berman, and, like

² References preceded by the letter "A" are to pages of appellant Berman's appendix.

him, they were charged with conspiring to import and possess hashish with intent to distribute, importation of hashish and possession of hashish with intent to distribute (A. 3-5).

II.

Almost immediately after his arrest, Berman, along with Atlas and Jacobs, agreed to cooperate with the Government in its investigation of the case. As a result, through information provided by Berman and his co-defendants, it was established that Atlas and Jacobs, along with others, had been involved in the smuggling of hashish into the United States since early 1972. During this period, over 2500 pounds of hashish were smuggled into the country through Kennedy Airport and subsequently distributed throughout the United States. Berman's role in the smuggling operation was to use his position as a legitimate businessman in the air-cargo business to assist in clearing the hashish through Customs. Berman also invested at least \$20,000 in the scheme and admitted that he made approximately \$80,000 from his participation in the conspiracy (P. 3-5).³

III.

By cooperating with the authorities, Berman, Atlas and Jacobs were each able to enter into an agreement with the United States Attorney's Office in the Eastern District of New York as to the disposition of the charges against him. Accordingly, on October 29, 1976, Berman appeared before Judge Bramwell with his attorney,

³ References preceded by the letter "P" are to pages of appellant Berman's presentence report. We are transmitting copies of the report to the Court for distribution to each member of the panel which will decide the case.

Howard Bogin, and pleaded guilty to the conspiracy charge (Count One) in the indictment. After going through the Rule 11 inquiry and establishing a factual basis for the plea, the court ascertained from Berman that no promises had been made to him with regard to the sentence he would receive (A. 12-17). The judge then asked the Assistant United States Attorney (Mr. Thompson) if *any* promises had been made, and the following ensued:

MR. THOMPSON: Yes. The defendant has agreed to enter a plea of guilty to Count 1 and to provide full cooperation. He has been debriefed by DEA agents and will testify before the grand jury and the trial, if requested. Nothing said by the defendant during the debriefing would be used against him except in the event of perjured testimony.

The Government in return will advise the Court prior to imposition of sentence of the full nature and extent of the defendant's cooperation and at time of sentence, upon imposition, will move to dismiss the remaining counts of the indictment.

THE COURT: Thank you, Mr. Thompson. Mr. Bogin, any other promises?

MR. BOGIN: No, that is the agreement between the Government and myself in its full terms (A. 18).

Thereafter, on November 5, 1976, Atlas and Jacobs also pleaded guilty to the conspiracy count of the indictment, at which time it was indicated by the prosecutor, in a letter handed to the judge, that Atlas and Jacobs had also agreed to cooperate and that at sentencing their cooperation would be made known to the court and the

remaining counts against them in the indictment would be dismissed (A. 22-37).⁴

IV.

Berman appeared for sentencing before Judge Bramwell on May 27, 1977. At sentencing, Berman was represented by Howard Bogin, and the court had before it a presentence report (A. 53). The report dealt at length with the offense to which Berman had pleaded guilty and, as noted above, described the arrest of Berman, Atlas and Jacobs and the nature and extent of the conspiracy in which they had been involved (P. 3-6). The report focused specifically on Berman's role in the smuggling operation, stating that it had been his job to facilitate the entry of the hashish into the country and to insure its smooth passage through Customs. The report also related that Berman was less culpable than other members of the conspiracy and that he had admitted his guilt (P. 6, 7). Finally, and most importantly, the report stated that Berman, along with Jacobs and Atlas, had cooperated fully with the Government and that their cooperation had led to the unearthing of the wideranging hashish conspiracy (P. 3-7, 17).

In commenting upon the report, Berman's attorney stated:

And I would also like to inform the Court that I, having read the presentence report, feel very comfortable about the accuracy, the literary quality and the fairness of that report (A. 53).

⁴ Also pleading guilty on November 5th to the charge of conspiring to import and possess hashish was Lawrence Friedman. Friedman's involvement in the scheme came to light through the DEA investigation and through information provided by Atlas and Jacobs (A. 40-50).

Counsel then proceeded to argue that Berman was less culpable than his co-defendants and asked for leniency on behalf of his client (A. 54-59). At the conclusion of counsel's remarks and after a brief statement by Berman himself, the Assistant United States Attorney spoke with respect to Berman's cooperation.

Mr. Berman has fully cooperated. The DEA has confirmed this and he has indicated and assured me of his continuing availability in the event the Government desires to use him as a witness (A. 59).

Thereafter, the court sentenced Berman, as indicated above, to a term of three years imprisonment and a special parole term of five years and imposed a \$10,000 fine. The remaining counts in the indictment were dismissed.⁵

ARGUMENT

The Government kept all of its plea agreement promises to Berman.

As noted above, Berman argues on appeal that the Government failed to keep the promises it made to him under the plea agreement. Specifically, he makes four claims: *first*, that the prosecution made no attempt to

⁵ Atlas, Jacobs and Friedman were also sentenced on May 27th. They received the following sentences (A. 95, 75, 105):

	Imprisonment	Special Parole	Fine
Atlas	3 years	7 years	\$10,000
Jacobs	2 years	5 years	None
Friedman	2 years	5 years	\$10,000

The sentences of Atlas and Jacobs were subsequently reduced pursuant to Rule 35 of the Federal Rules of Criminal Procedure to 2 years and 18 months respectively (A. 2, Br. 18).

Richard Kamen, who also pleaded guilty to the conspiracy count, was sentenced to 2 years imprisonment, a special parole term of 5 years and was fined \$10,000.

"minimize" his role in the conspiracy; *second*, that the Government "diluted" his cooperation by advising the court of the cooperation of other defendants; *third*, that the prosecution failed to prevent the court from utilizing at sentencing information gleaned through Berman's cooperation; and *fourth*, that the Government failed to advise the court that "without the full cooperation triggered by Berman," it was unlikely that the Government would have unearthed the full extent of the drug smuggling organization (Br. 18). We respectfully submit that Berman's contentions are totally without merit, for the record clearly shows that the Government kept its promises in all respects.

The United States made three promises to Berman: *one*, to bring his cooperation to the attention of the court; *two*, to not prosecute him for any of the criminal acts which he revealed in the course of his cooperation; and *three*, to dismiss Counts Two and Three of the indictment. No claim is made here that the second and third promises were not kept. Nor, we submit, can any such argument be made with respect to the first promise, for, as we have already shown, the presentence report chronicled Berman's cooperation at length, see *X v. United States*, 454 F.2d 255, 260-261 (2d Cir. 1971), *cert. denied*, 406 U.S. 961 (1972), and at sentencing, the Assistant United States Attorney stated that Berman had "fully" cooperated. Indeed, we believe that Berman's claims on appeal are nothing more than frivolous afterthoughts.

First of all, it can hardly be argued that there was "no attempt to minimize Berman's role in the narcotic conspiracy." (Br. 18). In fact, the presentence report specifically stated that Berman was "somewhat less culpable" than some of his co-defendants, and it detailed that his role was limited (P. 6-7). Moreover, it is clear that the Government's promise to Berman was that it would advise the court of his cooperation, not that it would

"minimize" his role in the conspiracy, even though, as we have seen, the presentence report did describe his limited role and lesser culpability.

Berman next argues that the Government "diluted" the effect of his cooperation by making the district court aware of the cooperation of others. This argument is preposterous, for it suggests that the Government should have fulfilled its promise to Berman but disregarded similar promises it made to others. Moreover, at the time Berman entered into the agreement with the United States Attorney's Office, he was aware that Atlas and Jacobs had entered into similar agreements regarding cooperation. Furthermore, in uncovering a narcotics conspiracy of the vastness of the one revealed in the instant case, it is often necessary for the prosecution to obtain the cooperation of many witnesses. The Government cannot be forced to forego or abandon promises made to others in order to, as Berman would have it, please one defendant by assuring that his cooperation will shine as the only star in the heavens.⁶

Berman's third contention is that, by revealing the full nature of the conspiracy to the court through information derived from his cooperation and that of others, the Government violated its agreement to make a "representation to the court for a more lenient sentence." (Br. 18). This argument also has no merit. As stated above, at no time did the Government promise Berman that it would appeal to the court for a more lenient sentence, and Berman himself stated that no such agreement had

⁶ And, of course, Berman was never promised that the cooperation of others would not also be brought to the attention of the judge. Finally, Berman's claim is based on the premise that the judge was incapable of considering the cooperation of each defendant on its own merits. There is absolutely no support for such a suggestion.

been made (A. 17 and *supra* p. 4). In addition, this Court has recognized that the Government has a duty to transmit to the sentencing judge the full facts of a case. *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977); *United States v. Needles*, 472 F.2d 652, 654-655 (2d Cir. 1973). Furthermore, it is inconceivable that the Government could have kept the promise it did make—to advise the court of Berman's cooperation—without making known the underlying facts revealed through the cooperation. Absent those underlying facts, the district court would have been presented with the naked representation that Berman had fully cooperated without knowing the nature and extent of that cooperation—an integral element of the Government's original promise to Berman. Thus, Berman's claim here amounts to nothing more than a complaint that the Government *kept* its promise.⁷ See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

Berman's final contention is that his cooperation "triggered" the unearthing of the full extent of the conspiracy and that the Government failed to advise the court of that fact (Br. 18). This claim is easily answered. The reason that the Government failed to advise the court in this manner is that, with regard to Berman, such a representation would have been untrue. The presentence report, read, unobjected to and even praised by Berman's counsel, states that "Berman's usefulness, however, [was] somewhat limited as he dealt

⁷ Berman's agreement with the Government did, in fact, result in his receiving a lower sentence than that which he could have received without cooperating. Two counts of the indictment, subjecting him to a possible maximum consecutive exposure of 10 years, \$30,000 in fines and a minimum of 4 years of special parole, were dismissed. 21 U.S.C. § 841 and § 960. In addition, as noted above, Berman received less than the maximum possible on the charge on which he was sentenced. 21 U.S.C. § 960.

exclusively with Atlas and was not aware of the identities of other individuals." (P. 7). The United States Attorney's Office could not have advised that Berman's cooperation revealed the full extent of the conspiracy because such a representation would have been false.

Thus, the record shows that the Government kept all of its promises to Berman and that his claims on appeal are without merit. Indeed, it would appear that Berman's complaints arise simply from dissatisfaction with the sentence he received, and this Court has consistently stated that it will not disturb on appeal a sentence, such as the one here, which is within statutory limits. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976), *rehearing denied*, 553 F.2d 8 (1977); *United States v. Stein*, 544 F.2d 96, 101 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976).⁸

⁸ Even assuming *arguendo* that there was any merit to Berman's claim, his only remedy in this case would be, submit, be either resentencing or vacatur of his guilty plea. *United States v. Paiva*, 294 F. Supp. 742 (D.C. 1969), the case cited by Berman in support of his contention that the indictment against him should be dismissed, is inapposite. It stands only for the proposition that when further prosecution results from the Government's failure to keep a plea bargain guaranteeing no such prosecution would take place, then the remedy is dismissal of the indictment. When failure to keep a plea agreement results in imposition of a different sentence, the remedy is resentencing or vacating the guilty plea. See *Santobello v. New York*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
October 26, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 31st day of October 1977 he served a copy of the within
Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Harold A. Bogin, Esq.

3000 Marcus Avenue

Lake Success, N.Y. 11040

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

31 day of Oct 1977

Paula J. Chang

PAUL J. CHANG
Notary Public, State of New York
No. 24340350
Qualified in Kings County
Commission Expires March 30, 1979